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U.S. Department of Labor

Office of Administrative Law Judges
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IN THE MATTER OF:	*	
	*	
Christina B. Saunders	*	
Claimant	*	
	*	
Against	*	Case No.: 2000-LHC-244
	*	
	*	OWCP No.: 1-142448
Navy Exchange	*	
Employer/Self-Insurer	*	
	*	
and	*	
	*	
Crawford & Co.	*	
Third Party Administrator	*	
	*	

APPEARANCES:

Robert P. Audette, Esq.
Leonard M. Cordeiro, Esq.
Bernice Stone, Esq.
For the Claimant

Richard F. van Antwerp, Esq.
For the Employer/Self Insurer

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), as extended by the provisions of the Non Appropriated Fund Instrumentalities Act 5 U.S.C. §8171, **et seq.**, herein jointly referred to as the "Act." The hearing was held on January 28, 2000 in New London, Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, JX for a Joint exhibit and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding if the claim is not barred by the so-called "coming and going rule."

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that she suffered an injury on November 13, 1997 in the course and scope of her employment.

4. Claimant gave the Employer notice of the injury in a timely fashion.

5. Claimant filed a claim for compensation on or about February 5, 1998 and the Employer filed a notice of controversion on or about February 5, 1998.

6. The parties attended an informal conference on September 14, 1999.

7. The applicable average weekly wage is $198.82.

8. The Employer has paid no benefits herein.

The unresolved issues in this proceeding are:

1. Whether the Claimant's injury arose out of and in the course of her employment.

2. If so, the nature and extent of her disability from November 13, 1997 through February 11, 1998.

3. Entitlement to payment of unpaid medical expenses and to an award of future medical benefits in the treatment of her November 13, 1997 injury.

4. Entitlement to an attorney fee award.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 11	Attorney Cordeiro's March 9, 2000 letter to Attorney van Antwerp	03/13/00
CX 12	Attorney Cordeiro's March 21, 2000	03/24/00

	letter to this Court (1) advising about the filing of post-hearing evidence and (2) confirming the date on which briefs will be filed, as well as the	
CX 13	February 14, 2000 Supplemental Testimony of the Claimant	03/24/00
EX 1	Attorney van Antwerp's letter filing	04/06/00
JX 1-8	A series of eight photographs relating to the accident scene, as well as the	04/06/00
EX 2	February 14, 2000 Deposition Testimony of Patricia Ann Taylor[1]	04/06/00
CX 14	Claimant's brief	04/ /00
CX 15	Attorneys' Fee Petition	04/17/00
EX 3	Employer's brief	05/19/00

The record was closed on May 19, 2000 as no further documents were filed.

Summary of the Evidence

Christina B. Saunders ("Claimant" herein), sixty-seven (67) years of age, with a high school education plus about one-and-one-half years of college, as well as a varied employment history, has worked at the Navy Exchange at the Newport Naval Base in Newport, Rhode Island for thirteen (13) years as of the date of her injury. As of November 13, 1997 Claimant's title was as a "food service" worker and her daily job duties included, **inter alia**, unloading from a cart cases of soda (each weighing ten (10) pounds), boxes of sandwiches (each weighing five (5) pounds) and other snack food items, Claimant remarking that on a typical day she would unload ten-to-twelve cases and four-to-five boxes, as well as other sundries, and store them in the refrigerators for sale to patrons at the base. Claimant worked five (5) days each week, from 6:30 a.m. to 2:00 p.m., and her work involved much bending, twisting, lifting and overhead reaching. She also operated the cash register

[1] Objections made by counsel at Ms. Taylor's deposition are overruled as the testimony is relevant and material to the issues herein and as the objections really go to the weight to be accorded to that testimony.

and at the end of the day she removed the unsold items, placed them in the carts and these were brought to a central storage facility. (TR 18-28)

On a typical day Claimant drives to work at the Naval Base and her vehicle has a decal which allows her to enter the base. She drives to and parks along side the Navy Exchange Building, walks 10-20 feet where she "punches" in her time card, obtains her set of keys and her money/change bag. She then returns to her car and drives to another location (the food service office) where a truck takes her and the food items she has obtained to the War College Building where she sets up for the day and works until 2:00 p.m. There are other parking areas at the base but because her shift starts at 6:30 a.m., she is directed to park by the side of that building so that she can "punch" in her time card and obtain her keys, Claimant remarking that she is only there for a few minutes. (TR 28-30)

According to Claimant, for about one week prior to November 13, 1997 a tractor-trailer and a forklift were parked just outside the Navy Exchange Building, with the forks on the lift resting on the ground. She had to walk by that forklift to enter the Navy Exchange. The forklift was operated by Exchange personnel to load items from the Exchange and onto the truck. The forklift was parked about five feet from the entrance to the building. Claimant typically arrived at about 6:15 a.m. at the Navy Exchange Building to "punch" in, and that was the only entrance she could use. (TR 30-34)

On November 13, 1997 Claimant, following her routine, entered the base, drove to the Exchange, parked her car by the side of the building, exited her car, walked across the street no more than twenty (20) feet to enter the building but, on this day, the forklifts were in an upraised position and, as it was still somewhat dark at about 6:15 a.m., and as she was about four feet from the entrance to the building, she walked right into and struck the forklift. Her glasses were "pushed against" her forehead but she did not fall to the ground. According to Claimant, she saw "stars," felt dizzy, went inside to "punch" in and got her keys and money bag. She then returned to her car, drove to the food service office and began her normal work day. However, her headaches worsened and she was also experiencing "blurriness." A secretary at the food service office, observing Claimant's condition, asked her what happened and she told the secretary about her encounter with the forklift. Claimant was told to talk to her immediate supervisor, Kevin Hussey, and to Patricia Taylor about the accident. Ms. Taylor filled out the injury report and Claimant signed the form. Mr. Hussey, observing the "big knot" on Claimant's forehead, took her to the base hospital where she was examined and various tests were performed. She was seen by a number of doctors for evaluation and treatment of her headaches, dizziness, pain radiating down her neck and for difficulty turning

her head and later in the week she was referred to an ophthalmologist because her "blurriness" continued. (TR 34-45)

Claimant was treated only at the base hospital and she was unable to work from November 13, 1997 through February 11, 1998, at which time the doctor released her to return to work on light duty. (TR 45-48)

The parties have offered a series of photographs relating to the accident site. JX 1 shows the spot where Claimant parked her vehicle near the Navy Exchange. JX 2 and JX 3 show the area where the forklift was parked and it clearly is in close proximity to the door through which Claimant entered the Exchange. JX 4 shows the sidewalk behind the Exchange (and the forklift was located at the far end of this sidewalk). JX 5 and JX 6 are photos of the forklift with the forks in the down position. JX 7 shows a trailer used "for storing excess inventory" and JX 8 shows the entrance to the vending/food service office.

Claimant gave supplemental testimony on February 14, 2000 (CX 13) after Claimant and counsel took a view of the sites reflected in the photographs and other sites pertinent to this proceeding.

A map of the Navy Base, prepared several years ago and admitted into evidence as CX 3, caused some confusion as to certain sites and their exact location. Thus, the parties have now offered another map of the base, and that is attached to CX 13 as a deposition exhibit. Claimant again testified as to her daily routine of entering the base through Gate 4–- "that's the gate nearest to the building that I have to report to" –- and that the on-duty military policeman, recognizing the base decal on her vehicle, allows her to enter. She then takes a right, a turn that puts her "(r)ight behind the Navy Exchange," identified on the map as NEX, with the circled X designating the rear of the building. After Claimant "punches" in, obtains her keys and money/change bag, she then drives from NEX to the food vending office, which also has a gas station in front, by taking a left turn and going around the Commissary over to the other street. The gas station area is designated "A" on the map. She then drives about ten (10) city blocks to Hewitt Hall at the War College, the site "where (she) sell(s) the food." According to Claimant, "Hewitt Hall is just like a big dining room where they eat in there and where (she) sell(s) (her) product," at an area at the bottom left-hand corner of the map identified as "Hewitt Building 991," or "B" on the map. (CX 13 at 3-16)

Claimant again testified that she reported the injury to Patricia Taylor at the food service office ("A"), that Ms. Taylor saw "the big knot" on her forehead, and Claimant proceeded to tell her what had happened, **i.e.**, that she had walked into the forks of the forklift, but she denied telling Ms. Taylor she had walked into a trailer, Claimant acknowledging at her deposition that "the

forklift was at the rear doors of the trailer, at the end of the trailer," that both the lift and the trailer were parallel to the rear entrance of the Navy Exchange Building and that she could have mentioned to Ms. Taylor "how (she had) walked into the forklift, that it was at the end of -- at the rear of the trailer," that the "trailer doors were open, and the forklift was at the rear of the trailer." (CX 13 at 17-21)

In response to cross-examination, Claimant testified that at the time of her injury, she had not reported for work, **i.e.**, "punched" in her time card, that she enters the base through Gate 4 because that is "the closest gate to the Exchange and that's where we're told to come in, yes," that the other gates "would be quite a distance away," and that Gate 4 provides her the most convenient and most direct route. According to Claimant, it takes her "anywhere from 10 to 15 minutes" to drive from the food service office ("A") to Hewitt Hall ("B") and she began her actual workday "as soon as (she) punched in." (CX 13 at 21-26)

The parties deposed Patricia Ann Taylor on February 14, 2000 (EX 2) and Ms. Taylor, who is an accounting clerk for the vending/food service at the Navy Exchange, testified that Kevin Hussy, the vending/food service manager, is her immediate supervisor, that she knows Claimant and that on November 13, 1997 Claimant came to her office at about 9:00 a.m., and Ms. Taylor noticed "a bump on her forehead." The bump was visible, "raised and discolored" and was "at least two inches across and maybe an inch in width." When Ms. Taylor asked Claimant what had happened, she replied, "I walked into the trailer in the back of the Exchange. And that was virtually all of our conversation." Ms. Taylor "told (Claimant) she needed to go back up to the Exchange where this event happened and go to see Barbara Lewis in the security office to fill out an accident report. And I asked her if she needed a ride. And she said no, she had her own vehicle and she would be okay." According to Ms. Taylor, Claimant "works at a building called Hewitt Hall in the snack bar where we have prepared products for her to sell to customers." Claimant did not work the rest of the day as "someone took her to the clinic over at the Naval Hospital." Later Ms. Taylor "understood that (Claimant) had said that she walked into the forklift but she told me it was a trailer." (EX 2 at 3-8)

Ms. Taylor "normally" would see Claimant every day when she would come to the food service office to "pick up money and a clipboard to control merchandise." She did not see the bump or bruise on Claimant's forehead on any day prior to November 13, 1997 and, according to Ms. Taylor, Claimant "simply said she walked into a trailer in the back of the Exchange. And I believe that was the extent of it, of our conversation about how and when it happened," Ms. Taylor admitting that there was a trailer parked in back of the Navy Exchange on November 13, 1997, similar to the trailer shown in JX 6, and that the trailers are used for temporary storage purposes

"if we're overstocked in the warehouse," as that merchandise would later be transferred into the store for sale to patrons. Ms. Taylor could not recall whether or not there was a forklift actually there on November 13, 1997, although she "would assume that there would be one in the vicinity of that area because it is normally stored up in that area. But the trailer was there as well." Moreover, "Since (the accident) happened at that building and the security supervisor was up there, (Ms. Taylor) suggested Tina (Claimant) go to that location and fill out" the injury report. (EX 2 at 8-13)

According to Ms. Taylor, apparently Claimant "was (not) aware that (the bruise) was as obvious as it was." (EX 2 at 14)

In this proceeding, Claimant seeks benefits for temporary total disability from November 13, 1997 (as she was not paid for that day (TR 99) but had to take a sick day therefor) through February 11, 1998, as well as appropriate medical benefits.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24

BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." (**Id.**) The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes,**

supra; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that she experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by “substantial evidence to the contrary” offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not “play a significant role” in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which

did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between

the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to her bodily frame, **i.e.**, her head and neck injury, resulted from her November 13, 1997 accident at the Employer's facility. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983);

Mijangos, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant sustained a work-related injury on November 13, 1997, in an accident that occurred at the Employer's facility at the Newport Naval Base, that Claimant, as a civilian employee, is covered by the Non Appropriated Fund Instrumentalities Act, that Claimant's injury was treated at the Newport Naval Hospital from November 13, 1997 through January 27, 1998 (EX 4), that the doctors kept Claimant out of work until February 12, 1998, at which point she was released to return to work on light duty, that the Employer has provided suitable work within her restrictions, that Claimant gave the Employer notice of her injury on the same day, that the Employer has consistently refused to accept the injury as compensable because of the so-called "coming and going" rule and that Claimant timely filed for benefits once a dispute arose between the parties. (CX 1, CX 5-10)

The principal issue remaining is whether or not Claimant's injury arose out of or in the course of her employment and whether or not the factual scenario presented herein comes within the purview of one of the exceptions to the so-called "coming and going rule," issues I shall now resolve.

Initially, I would note that Employer's counsel makes a valiant attempt to justify and support the Employer's position but that position is far outweighed by the plethora of pertinent precedents at the Board level and at the Circuit Court level.

Course of Employment

The general rule applied by the Board is that an injury occurs in the "course of employment" if it occurs within the time and space boundaries of employment and in the course of an activity whose purpose is related to the employment. **Wilson v. WMATA**, 16 BRBS 73 (1984); **Mulvaney v. Bethlehem Steel Corporation**, 14 BRBS 593 (1981). In contrast, "arises out of employment" refers to the cause of source of injury. **Mulvaney v. Bethlehem Steel Corporation**, 14 BRBS 593, 595 (1981). **See also Larson, The Law of Workers' Compensation** § 14.00.

It is not always necessary that the particular act or event which causes the injury be itself a part of the work done for the employer, or be an activity for the employer's benefit. An activity is no longer in the course of employment, however, if the employee goes so far from his employment and becomes so thoroughly disconnected from the service of his employer that it would be

entirely unreasonable to say that his injury arose out of and in the course of employment. **O'Leary v. Brown-Pacific-Maxon**, 340 U.S. 504, 507 (1951); **Kielczewski v. The Washington Post Company**, 8 BRBS 428, 431 (1978).

The Board has held that the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), that the claim comes within the provisions of the Act, applies to the issue of whether an injury arises in the course of employment. **Mulvaney v. Bethlehem Steel Corporation**, 14 BRBS 593 (1981)(held, administrative law judge erred in not applying presumption); **Wilson v. WMATA**, 16 BRBS 73 (1984). Employer, therefore, has the burden to produce evidence to the contrary. **Mulvaney v. Bethlehem Steel Corporation**, 14 BRBS 593 (1981); **Oliver v. Murry's Steaks**, 17 BRBS 105 (1985).

Generally, employees who, within the time and space limits of their employment, act to accommodate personal comforts do not thereby leave the course of employment. **Durrah v. WMATA**, 760 F.2d 322, 17 BRBS 95 (CRT)(D.C. Cir. 1985), **rev'g** 16 BRBS 333 (1984). Injuries have been found to be compensable which have occurred while the employee was on a personal comfort break, **Wheatley v. Adler**, 407 F.2d 307 (D.C. Cir. 1968); was examining a personal handgun during a work break, **Evening Star Newspaper v. Kemp**, 533 F.2d 1224, 3 BRBS 379 (D.C. Cir. 1976, **aff'g** 1 BRBS 195 (1974); was taking a soda break, **Durrah v. WMATA**, 760 F.2d 322, 17 BRBS 95(CRT)(D.C. Cir. 1968); and was taking a lunch break, **O'Leary v. Southeast Stevedore Co.**, 1 BRBS 298 (1975). **But see Carchedi v. Beau Bogan, Inc.**, 11 BRBS 359 (1979)(benefits denied where employee injured by purse-snatcher outside work during lunch break).

An injury can be compensable if it occurs during off-duty hours, so long as claimant is on the work premises for a work-related reason. **Wilson v. WMATA**, 16 BRBS 73 (1984)(obtaining authorization form to purchase uniform); **Kielczewski v. The Washington Post Company**, 8 BRBS 428 (1978)(employee remains on premises after work hours to speak to foreman about promotion). **See also Preskey v. Cargill, Inc.**, 12 BRBS 916 (1980, **rev'd mem.**, 14 BRBS 340 (9th Cir. 1981)(employee arrives before start of work to pick up check and drink coffee).

The employment nexus, however, may be severed if the employee violates an express prohibition, acts without authorization, acts for purely personal reasons, or has abandoned his employment-related duties and status and has embarked on a personal mission of his/her own. **Mulvaney v. Bethlehem Steel Corporation**, 14 BRBS 593, 595 (1981); **Oliver v. Murry's Steaks**, 17 BRBS 105, 108 (1985); **Durrah v. WMATA**, 16 BRBS 333, 335 (1984), **rev'd**, 760 F.2d 322, 17 BRBS 95 (CRT)(D.C. Cir. 1985). In **Durrah**, the Board affirmed a denial where the employee was injured when getting a soda in violation of a rule against leaving his post without permission. In reversing, the D.C. Circuit stated that "(t)he asserted violation did not place Durrah in the path of new risks not

inherent in his employment situation." **Durrah v. WMATA**, 760 F.2d 322, 236, 17 BRBS 95, 100 (CRT)(D.C. Cir. 1985).

Injuries sustained during physical altercations at work have been regarded as sustained in the course of employment so long as they occur within the time and space boundaries of work. **Williams v. Healy-Bull-Greenfield**, 15 BRBS 489, 492 n.2 (1983); **Kielczewski v. The Washington Post Company**, 8 BRBS 428, 431 (1978); **Hartford Accident & Indemnity Co. v. Cardillo**, 112 F.2d 11 (D.C. Cir. 1940). Such injuries, however, do not arise out of employment, if the dispute giving rise to the physical altercation has its origins in the employee's domestic or personal life. **Figuero v. National Steel and Shipbuilding Company**, 8 BRBS 852 (1978), **aff'd mem.**, No. 78-3345 (9th Cir. 1980)(benefits denied where employee is assaulted by a co-worker's former boyfriend). Injuries caused by fights with co-workers have been found to be compensable where employer presented no evidence that the injured employee had any personal or social contacts with the assailant outside of work. **Twyman v. Colorado Security**, 14 BRBS 829 (1982), **on remand from** 670 F.2d 1235 (D.C. Cir. 1981), **vacating and remanding** 12 BRBS 863 (1980) (Miller, dissenting); **Williams v. Healy-Bull-Greenfield**, 15 BRBS 489, 492 (1983). **See also** 33 U.S.C. §903(b)(compensation not payable where an injury is occasioned solely by the willful intention of the employee to injure or kill himself or another) and 33 U.S.C. §920(d).

Injuries sustained by employees on their way to and from work are generally not considered to arise in the course of employment. **Cardillo v. Liberty Mutual Insurance Company**, 330 U.S. 469 (1979); **Foster v. Massey**, 407 F.2d 343 (D.C. Cir. 1968); **Owens v. Family and Homes Services, Inc.**, 2 BRBS 240 (1975). In **Foster**, benefits were denied when the injury occurred while the employee was driving to work in his personal automobile. **See also King v. Unique Temporaries, Inc.**, 15 BRBS 94 (1981), **aff'd mem. sub nom. King v. Director, OWCP**, 684 F.2d 1032 (D.C. Cir. 1982)(no coverage where employee slips on ice before entering work building); **Palumbo v. Port Houston Terminal, Inc.**, 18 BRBS 33 (1986)(claimant injured when he slipped and fell on his way from a parking area to employer's premises was not covered as he had not yet arrived at work); **Lasky v. Todd Shipyards Corporation**, 8 BRBS 263 (1978)(no coverage where worker is assaulted while walking to work)(plurality opinion by Judge Miller; Chief Judge Smith concurs on ground that situs test not met).

Several exceptions to this general rule have been recognized in situations where "the hazards of the journey may fairly be regarded as the hazards of the service." **Cardillo v. Liberty Mutual Insurance Company**, 330 U.S. 469, 479 (1979). These exceptions include situations in which (1) the employer pays for the employee's travel expenses, for furnishes the transportation, (2) the employer controls the journey, or (3) the employee is on a special errand for the employer. **Cardillo v. Liberty Mutual**

Insurance Company, 330 U.S. 469 (1979); **Foster v. Massey**, 407 F.2d 343 (D.C. Cir. 1968); **Perkins v. Marine Terminals Corporation**, 673 F.2d 1097, 14 BRBS 771 (9th Cir. 1982), **rev'g** 12 BRBS 219 (1980)(Miller, dissenting).

In several cases the first exception, the trip-payment exception, has been applied. **Cardillo v. Liberty Mutual Insurance Company**, 330 U.S. 469 (1979)(accident while leaving work in personal car, where employer pays expenses); **Perkins v. Marine Terminals Corporation**, 673 F.2d 1097, 14 BRBS 771 (9th Cir. 1982)(accident while driving home in personal car, where employer paid wages for travel time); **Sawyer v. Tideland Welding Service**, 16 BRBS 344 (1984)(travel expenses paid; injury on road which is an access road to marine facilities); **Owens v. Family and Homes Services, Inc.**, 2 BRBS 240 (1975)(after leaving work, employee is hit by automobile while walking to bus stop; employer paid transportation expenses). **See Oliver v. Murry's Steaks**, 17 BRBS 105 (1985)(accident of on-call employee while driving home in van provided by employer would be covered; case remanded for findings regarding whether claimant was in fact on his way from work to home). The Board has found the exception did not apply where the employer merely provided a truck and claimant was injured on his way home, **Smith v. Fruin-Colnon**, 18 BRBS 216 (1986); and where a personal deviation broke the employment nexus. **Bobier v. The Macke Co.**, 18 BRBS 135 (1986)

In two cases arising under the Defense Base Act, 42 U.S.C. §1651 **et seq.**, the Supreme Court allowed benefits where the injury did not occur within the space and time boundaries of work, but the employee was in a "zone of special danger." In **O'Leary v. Brown-Pacific-Maxon**, 340 U.S. 504 (1951), the employee, wile spending the afternoon in employer's recreational facility near the shoreline in Guam, drowned when attempting to rescue two men in a dangerous channel. The Court stated that "(a)ll that is required is that the obligations or conditions of employment create the zone of special danger out of which the injury arose." **O'Leary v. Brown-Pacific-Maxon**, 340 U.S. 504, 507 (1951). In **O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.**, 380 U.S. 359 (1965), the employee drowned in a lake in South Korea during a weekend outing away from the job; the Court noted that the employee had to work "under the exacting and dangerous conditions of Korea." **O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.**, 380 U.S. 359, 364 (1965). **See also Ford Aerospace and Communications Corp. v. Boling**, 684 F.2d 640 (9th Cir. 1982)(heart attack while off duty in barracks provided by employer in Thule, Greenland, is covered under zone of special danger test).

In a case reversed by the Ninth Circuit without opinion, the Board held that the "zone of special danger" doctrine only applies to the peculiar risks arising in foreign settings under the Defense Base Act. **Preskey v. Cargill, Inc.**, 12 BRBS 916 (1980), **rev'd mem.**, No. 80-7638, 14 BRBS 340 (9th Cir. 1981). The District of Columbia Circuit has, however, applied this doctrine in non-Defense

Base Act cases. **Delinski v. Brandt Airflex Corporation**, 645 F.2d 1053, 13 BRBS 133 (D.C. Cir. 1981)(employee injured while walking up 9 flights of stairs to work; general coming and going rule not applicable because the stairway constitutes a zone of special danger); **Durrah v. WMATA**, 760 F.2d 322, 17 BRBS 95(CRT)(D.C. Cir. 1985).

Claimant's mere presence on employer's parking lot at the time of her injury is insufficient to establish that her injury arose in the course of her employment if she was participating in an unsanctioned social activity at the time. In a footnote, the Board noted that the coming and going rule does not apply where claimant is on employer's premises. The case was remanded to reconsider whether claimant's social activities severed the link with her employment. **Alston v. Safeway Stores, Inc.**, 19 BRBS 86 (1986).

In a significant decision, the Board reversed an administrative law judge's finding that claimant's injury did not occur in the course of employment. The administrative law judge found that claimant's use of the work equipment on which he was injured was unauthorized and therefore concluded that claimant was not acting in the course of his employment when injured. The Section 20(a) presumption applies to the issue of whether an injury arises in the course of employment. The fact that an activity is not authorized is not sufficient alone to sever the connection between the injury and the employment. Employer did not present any evidence that claimant's work activity at the time of his injury was unrelated to his employment. Since there was no evidence of record directly controverting the presumption, claimant's injury arose in the course of his employment as a matter of law. **Willis v. Titan Contractors, Inc.**, 20 BRBS 11 (1987).

In another significant decision, the Board affirmed the administrative law judge's finding that claimant's injury arose in the course of employment based on: 1) his application of the "zone of special danger" theory in a D.C. Act Case; 2) his determination that: where entertainment is part of an employee's duties, it is necessary to provide such duties in private homes, and there is an evening curfew, it is reasonably foreseeable that an employee could suffer an injury in a private home after his employment duties were completed; and 3) his conclusion that as claimant's presence in the house was not for purely personal reasons, he had not severed the employment nexus. **Furlong v. American Security & Trust Co.**, 21 BRBS 155 (1988).

Where claimant, an employee covered under the Non Appropriated Funds Instrumentalities Act, was injured on a defense base prior to her arrival at employer's facility, the administrative law judge's finding that the "coming and going" rule applied and that she was not injured in the course of her employment was affirmed. The zone of special danger rule is limited to cases arising under the Defense Base Act and the District of Columbia Workmen's

Compensation Act, and the finding that the circumstances of employment did not create a zone of special danger was rational and supported by substantial evidence. **Cantrell v. Base Restaurant, Wright-Patterson Air Force Base**, 22 BRBS 372 (1989).

For an injury to arise in the course of employment, it must have occurred within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. Injuries sustained on the way to and from work are generally not within the scope of employment. The Board sets forth the exceptions to the "coming and going" rule. In this case, where it was undisputed that claimant was injured in a parking lot on an air force base, the Board held that the parking lot was not part of employer's premises and that the injury is not compensable. Although employer is located on the base, it is a separate entity operating on nonappropriated funds. Employer thus lacks any control over or responsibility for the condition of the area surrounding the building it occupies, including the parking lot. In addition, the injury did not occur during the "time boundaries" of claimant's employment. Finally, the administrative law judge erred by relying on the "zone of special danger" doctrine, as it is inapplicable to the Nonappropriated Funds Instrumentalities Act. **Harris v. England Air Force Base Nonappropriated Fund Financial Management Branch**, 23 BRBS 175 (1990).

In a case where claimant satisfied the time and space boundaries of employment, the Board affirmed the administrative law judge's finding that claimant, a forklift driver, was acting within the course of his employment when he paused momentarily on the way to his forklift to help an off-duty co-worker start his car. Claimant was burned when the gasoline ignited, and the administrative law judge found that this injury occurred while claimant was indirectly advancing the interests of his employer by maintaining an amiable relationship with a known hostile employee. The Board also found that this activity would have been considered in the course of employment had the administrative law judge used an alternate test which considers to the degree to which claimant deviated from his duties to aid a co-employee in some matter that is entirely personal to the co-employee. Under this alternate test, the Board held that claimant's deviation from his job responsibilities was insubstantial, as the car was in the direct path between the locker room and the forklift and the aid should have taken just a few seconds. **Boyd v. Ceres Terminals**, 30 BRBS 218 (1997).

The Fourth Circuit held that even though the parking lot where claimant was injured on her way to work was not owned by employer, the lot was part of employer's "premises" for purposes of the Act's course of employment requirement as the parking lot was designated for the exclusive use of employees, employees were prohibited from parking elsewhere unless the lot was full, employer enforced the

parking rules, and employer directed employees to do certain upkeep on the lot, such as trash and ice removal (but did not perform major structural repairs). As the injury occurred on employer's premises, the "coming and going" rule is inapplicable. The holding was specifically limited - it does not suggest worker's compensation coverage for all injuries suffered in parking lots used by employees. **Shivers v. Navy Exchange**, 144 F.3d 322, 32 BRBS 99(CRT)(4th Cir. 1998).

Where claimant injured herself on an ice-covered sidewalk adjacent to the employee-designated entrance door of employer's facility, the Board distinguished **Harris**, 23 BRBS 175 (1990), and **Cantrell**, 22 BRBS 372 (1989), and held that since employer exercised control over the area where claimant was injured, claimant's injury arose in the course of her employment. Specifically, employer designated the parking lot its employees were to use, and the administrative law judge credited testimony that employer maintained the sidewalk. In so holding, the Board applied the rationale of the Fourth Circuit in **Shivers v. Navy Exchange**, 144 F.3d 322, 32 BRBS 99(CRT)(4th Cir. 1998). **Trimble v. Army & Air Force Exchange Service**, 32 BRBS 239 (1998).

In another significant case, the Board held, based on the facts of the case, that claimant's injury occurred on employer's "premises" and thus, reversed the administrative law judge's denial of benefits on the ground that claimant's injury on her way to work did not occur in the course of her employment. Specifically, the Board held that although employer may not be responsible for the maintenance of the area surrounding its building, as there is no evidence of record on this issue either way, it is nevertheless responsible for the deteriorated condition of that area, as moving trucks used by employer to relocate its operation caused the destruction of the sidewalk and the ruts in the surrounding grass area where claimant's injury occurred. The instant case involved an affirmative act on the part of the employer in operating its business, which created a risk of employment not shared with the public. This established that employer exercised sufficient control over the area where claimant's injury occurred so that the area in question is to be considered part of employer's premises. Consequently, the coming and going rule is not applicable to that case. **Sharib v. Navy Exchange Service**, 32 BRBS 281 (1998).

The Board affirmed the administrative law judge's determination that claimant's injury did not occur within the course of his employment. The Board held that, although claimant was injured during the time and space boundaries of his employment because he was injured on a vessel under construction on employer's premises during the work day, his injury happened while he was engaged in an activity which did not have a purpose related to his employment. Specifically, claimant was injured when he was on a detour to a remote area of the ship for the purpose of smoking a marijuana cigarette, and the Board agreed with the administrative

law judge's conclusion that this was a personal frolic which severed the employment nexus. Although there are personal activities which occur during the course of the workday that do not sever the nexus, the Board could not equate claimant's activities here with those types of activities, as employer could not have expected its employee to venture into a closed area of the ship to commit a crime. Therefore, the Board affirmed the administra6tive law judge's denial of benefits. **Compton v. Avondale Industries, Inc.**, 33 BRBS 174 (1999).

I have extensively set out the pertinent case law to put this matter in proper perspective for the parties and for reviewing authorities.

Initially, I find and conclude that the so-called "coming and going" rule does not apply in this case because Claimant was injured on her Employer's premises, a federal facility known as the Newport Naval Base. As noted above, the U.S. Court of Appeals for the Ninth Circuit held that accidents which occur on the "premises" are not subject to the "coming and going rule." **Presley v. Cargill, Inc.**, 14 BRBS 340 (9th Cir. 1981), **rev'g** 12 BRBS 916 (1980). Moreover, as stated so articulately by my now retired and distinguished colleague, Judge Thomas A. Schneider, "As to employees having fixed hours and place of work, injuries occurring "on the premises" while they are going to and from work before or after working hours or at lunch time are compensable. **Quintanilla v. National Steel Ship Building Company**, 24 BRBS 614, 616 (ALJ)(1991). Thus, once the employee reaches the employer's premises, he/she is no longer "coming," and until he/she exits the premises, he/she is not yet "going" and, in either event, he/she remains "in the course of employment." **Sobaczynski v. Pile Foundation Construction**, 30 BRBS 580 (ALJ)(1996).

I also note that parking areas, common areas or other abutting areas may or may not be considered part of the employer's premises depending on the specific circumstances of each case. Generally, if an area is owned by the employer, or maintained by the employer for his employees ... whether within the main company premises or separated from it, it will be considered part of the employer's premises." **Larson** at §15.42(a). Furthermore, **Larson** points out that his general rule is "by no means confined to parking lots owned, controlled, or maintained by the employer" and has been "applied when the lot although not owned by the employer was exclusively used, or used with the owner's permission or just used by the employees of the employer." (**Id.**) (**See also Sobaczynski v. Pile Foundation Construction**, 30 BRBS 580 (ALJ)(1996)). Thus, if the parking lot area is considered part of the Employer's premises, it follows that "compensation coverage attaches to any injury that would become compensable in the main premises." (**Id.**)

In **Sobaczynski**, the claimant, a dock builder, was injured when he slipped and fell on a pier while walking towards his parked car.

The Court held that the claimant was injured in the course of his employment since he was on the employer's premises. Because the employer allowed the claimant to park on its pier and told him where to park, the injury was found to be compensable even though the claimant was leaving work with the employer's permission because his mother was ill.

The facts in the instant matter are stronger than the facts in **Sobaczynski** because here the Claimant was not injured in a parking area. Rather, the Claimant had walked from the parking area to the sidewalk abutting the rear entrance of the Exchange. When she attempted to step over the forks of a forklift which obstructed the rear entrance, she truck her forehead on the raised forks of the lift. This occurred only four (4) or five (5) feet away from the entrance door to the Navy Exchange. Further, she had observed employees of the Employer exercising dominion and control over the forklift and trailer which obstructed her entrance to the Employer's premises. No evidence has been presented by the Employer to show that the trailer and forklift in question were under the control of anyone else other than Navy Exchange employees. In fact, Ms. Taylor testified that the trailer was used to store items and that she assumed the forklift was used to move items from the trailer to the warehouse and vice versa. Had it not been for the positioning and the placement of the forklift and trailer in question, the Claimant would never have sustained her injuries, in my judgment.

Further, the Employer has not introduced any evidence to the contrary to show that it was anyone other than a Navy Exchange employee who had left the forks of the forklift in question in the upward position, causing the Claimant to strike her forehead on the same on the morning of November 13, 1997. Therefore, I find and conclude that Claimant was "on the employer's premises" when her injury occurred, making the "coming and going" rule inapplicable.

Finally, as noted in the recent case of **Shivers v. Navy Exchange**, 144 F.3d 322, 32 BRBS 99 (CRT) (4th Cir. 1998), Chief Judge Wilkinson of the Fourth Circuit issued a ruling which supports the Claimant's argument that her injury occurred on the Employer's premises and, therefore, arose out of and in the course of her employment. **See also Trimble v. AAFES**, 32 BRBS 239 (1998).

The claimant in **Shivers** worked as a sales clerk in the men's department of the Navy Exchange, a retail store located in a mall at the Norfolk Naval Base. On March 5, 1993, she drove to work and parked as she normally did, in the employee parking lot opposite the store's employee's entrance. When the claimant went to step onto a median strip of grass in the parking lot, she slipped and fell. As a result of her injuries, she underwent surgery on her leg and came under the care of an orthopedic surgeon who treated her for over one year. The only issue before the Court in **Shivers** was whether or not the claimant was precluded from receiving

benefits under the Act due to the "coming and going" rule. The Administrative Law Judge at the hearing level denied Shiver's claim under the Act because he found that:

> "the Navy Exchange's employee parking lot was not part of its premises. He concluded that, because the Navy owned the property on which the employee lot was located, it could not be considered part of the Navy Exchange's premises. The ALJ also determined that the Exchange did not exercise sufficient control over the lot to make it part of its premises." (**Id.** at 324)

The claimant in **Shivers** then proceeded to appeal that matter to the Fourth Circuit Court of Appeals. Chief Judge Wilkinson, writing for the Fourth Circuit, reasoned that "the single legal issue presented in this appeal is whether a parking lot maintained by an employer for its employees should be considered part of that employer's premises for the purposes of the Act's course-of-employment." (**Id.** at 324) The Court reversed the ALJ's findings stating that:

> **"Along with the majority of Courts considering these questions under similarly worded workers' compensation statutes, we hold that such a parking lot is part of the employer's premises. The leading treatise in the field explains: 'as to parking lots owned by the employer, or maintained by the employer for its employees practically all jurisdictions now consider them part of the 'premises, whether within the main company premises or separated from it'. 1 Larson's Workers' Compensation Law, §15.42(a) (emphasis added). (Footnote omitted)." Id. at 324-325.**

The Court in **Shivers** reasoned and concluded that the Claimant's March 5, 1993 accident was covered by the Longshore Act, as extended by the Non-Appropriated Fund Instrumentalities Act, because "although the Navy Exchange did not actually own the parking lot property, it did direct its employees to park there and have an active hand in controlling the lot. Accordingly, we [Fourth Circuit] find that the lot bears a sufficient connection to Navy Exchange's work place such that the parking lot should be considered part of its premises for purposes of recovery under LHWCA." (**Id.** at 325)

Clearly, the instant case presents a much stronger factual basis for finding that the Claimant's injury occurred on the Employer's premises as defined by **Larson**. In this case, the injury occurred only a few feet from the entrance of the Exchange, much closer in proximity to the Employer's building than in **Shivers**. Also, the injury sustained by the Claimant in the instant matter was not caused by a slip and fall in the parking lot but rather by the leaving of the forks of the forklift in the upward position by

Navy Exchange personnel. These actions caused the Claimant's path, leading to the rear entrance of the Navy Exchange, to be obstructed, and I so find and conclude.

While the Claimant in the instant matter presented evidence of the Employer's dominion and control of the area located behind the Navy Exchange building and the various transportation vehicles used in such area (**i.e.**, forklift, trailer), the Employer presented no evidence to rebut the Claimant's testimony. Thus, the Claimant's accident occurred on the Employer's premises and, therefore, in the course of her employment with the Employer on November 13, 1997, and I so find and conclude.

As further noted above, Claimant testified most credibly that she had been directed by the Employer to park in the lot in the rear of the building of the Navy Exchange. The Employer directed her to park in this lot since the rear entrance of the Navy Exchange was the only entrance available to her that was open at that time of the morning. As Claimant's injury occurred on the only route available to her to get to the only entrance of the building which was open at that early hour of the day, her Employer had exercised its dominion and control over this route when its employees parked a trailer and a forklift along the sidewalk parallel to the building and the lot, obstructing the Claimant's path to the only available entrance of the Navy Exchange. This exercise of dominion and control over the corresponding parking lot, trailer and forklift caused the Claimant's head and neck injury as she proceeded to walk across the forks of the lift which were left in the upward position. When this occurred, she was only four (4) or five (5) feet away from the only entrance to the Employer available to her when she struck her head. The accident occurred just prior to the time she was scheduled to begin work because approximately a few minutes after the accident, the Claimant punched in for work.

In view of the foregoing, I find and conclude that Claimant's accident is compensable under the Act. Her injuries occurred within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment. **Wilson v. WMAT**, 16 BRBS 73, 75 (1984).

Finally, another reason to find jurisdiction and coverage herein because her sole remedy is under the Longshore Act since her injury is not compensable under the Rhode Island Workers' Compensation statute. **Traywick v. Juhola**, 922 F.2d 786 (11th Cir.)(1991); **Wilder v. United States**, 873 F.2d 285 (11th Cir.)(1989). Since the Claimant is an employee of a non-appropriated fund instrumentality, she is also excluded from coverage under the Federal Employee's Compensation Act (FECA). **Johnson v. U.S.**, 600 F.2d 1218 (6th Cir.)(1979). A denial of benefits under the Longshore Act effectively leaves the Claimant without a remedy as she cannot file a claim under the Federal

Employee's Compensation Act nor can she pursue a claim in the Rhode Island Workers' Compensation Court. A denial of benefits to the Claimant herein would effect a harsh and incongruous result contrary to the humanitarian nature and liberal construction of the Act. **Voris v. Eikel**, 46 U.S. 328 (1953), and I so find and conclude.

Employer's counsel's attempt to justify the Employer's position is denied as the few cases he cites are clearly distinguishable and are far outweighed by the plethora of precedents cited above.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work she can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which she is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of her disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that she is unable to return to her former employment because of a work-related injury, the burden shifts to the Employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which Claimant is capable of performing and which she could secure if she diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that she has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), she bears the burden of demonstrating her willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that she could not return to work as a food service worker from November 13, 1997 through February 11, 1998. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant had a total disability from November 13, 1997 through February 11, 1998.

Claimant's injury has not become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock**

Company, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

In this proceeding, the Claimant has sought, both before the District Director and before this Court, benefits for temporary total disability for the time period outlined above. Moreover, the issue of permanency has not yet been considered by the District Director. (ALJ EX 2) **In this regard, see Seals v. Ingalls Shipbuilding, Division of Litton Systems, Inc.**, 8 BRBS 182 (1978).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of her work-related injury on the same day and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, in view of the foregoing, Claimant is entitled to an award of benefits for such reasonable and necessary medical care and treatment in the diagnosis, evaluation and treatment of her head and cervical injury resulting from her November 13, 1997 accident, subject to the provisions of Section 7 of the Act.

Section 14(e)

Failure to begin compensation payments or to file a notice of controversion within twenty-eight (28) days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to ten (10) percent of the overdue compensation. The first installment of compensation to which the Section 14(e) assessment may attach is that installment which becomes due on the fourteenth day after the employer gained knowledge of the injury or the potential dispute. **Universal Terminal and Stevedoring Corp. v. Parker**, 587 F.2d 608 (3d Cir. 1978); **Fairley v. Ingalls Shipbuilding**, 22 BRBS 184 (1989), **aff'd in pert. part** and **rev'd on other grounds sub nom. Ingalls Shipbuilding v. Director**, 898 F.2d 1088 (5th Cir. 1990), **rehearing en banc denied**, 904 F.2d 705 (June 1, 1990) **Krotsis v. General Dynamics Corp.**, 22 BRBS 128 (1989), **aff'd sub nom. Director, OWCP v. General Dynamics Corp.**, 900 F.2d 506, 23 BRBS 40, 51 (2d Cir. 1990); **Rucker v. Lawrence Mangum & Sons, Inc.**, 18 BRBS 76 (1987); **White v. Rock Creek Ginger Ale Co.**, 17 BRBS 75, 78 (1985); **Frisco v. Perini Corp.**, 14 BRBS 798 (1981). Liability for this additional compensation ceases on the date a notice of controversion is filed or on the date of the informal conference, whichever is earlier. **National Steel & Shipbuilding Co. v. U.S. Department of Labor**, 606 F.2d 875 (9th Cir. 1979); **National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1978); **Spencer v. Baker Agricultural Company**, 16 BRBS 205 (1984); **Reynolds v. Marine Stevedoring Corporation**, 11 BRBS 801 (1980).

The Benefits Review Board has held that an employer's liability under Section 14(e) is not excused because the employer believed that the claim came under a state compensation act. **Jones v. Newport News Shipbuilding and Dry Dock Co.**, 5 BRBS 323 (1977), **aff'd sub nom. Newport News Shipbuilding & Dry Dock Co. v. Graham**, 573 F.2d 167 (4th Cir. 1978), **cert. denied**, 439 U.S. 979 (1978).

The Benefits Review Board has held that "a notice of suspension or termination of payments which gives the reason(s) for such suspension of termination is the functional equivalent of a Notice of Controversion." **Hite v. Dresser-Guiberson Pumping**, 22 BRBS 87, 92 (1989); **White v. Rock Creek Ginger Ale Company**, 17 BRBS 75, 79 (1985); **Rose v. George A. Fuller Company**, 15 BRBS 194, 197 (1982) (Chief Judge Ramsey, concurring).

While the Employer submits that the LS-207 is timely (TR 16), it is well-settled that the Section 14(e) additional assessment is mandatory and may not be waived by Claimant. **Tezeno v. Consolidated Aluminum**, 13 BRBS 778 (1981); **McNeil v. Prolerized New England Co.**, 11 BRBS 576 (1979); **Harris v. Marine Terminals Corp.**, 8 BRBS 712 (1978); **Nulty v. Halter Marine Fabricators, Inc.**, 1 BRBS 437 (1975). It is also well-settled that compensation becomes due

fourteen (14) days after the employer has knowledge of its employee's injury or death, and not until such time as the claim is filed. **Pilkington v. Sun Shipbuilding & Dry Dock Company**, 9 BRBS 473 (1978). The Employer has consistently treated the November 13, 1997 injury as non-industrial (TR 15-16) and took no action until on or about February 5, 1998. (**Id.**) Thus, the Section 14(e) additional assessment applies herein on those installments due between November 13, 1997 and February 11, 1998, or the filing of the Form LS-207 with the District Director, whichever event is earlier.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorneys filed fee applications on April 17, 2000 (CX 15), concerning services rendered and costs incurred in representing Claimant between January 6, 1998 and April 10, 2000. Attorney Leonard M. Cordeiro, Robert P. Audette and Bernice Stone seek a fee of $6,751.05 (including expenses) based on 42.80 hours of attorney time at $150.00 per hour. Litigation expenses total $331.05. (**Id.**)

In accordance with established practice, ordinarily I would consider only those services rendered and costs incurred after September 14, 1999, the date of the informal conference. However, as the Employer has filed no comments, I shall consider the entire fee petitions in the interest of the judicial efficiency.

In light of the nature and extent of the excellent legal services rendered to Claimant by her attorneys, including submitting one of the best briefs ever filed with this Administrative Law Judge in a matter under the Act, the amount of compensation obtained for Claimant and the Employer's lack of comments on the requested fee, I find a legal fee of $ 6,751.05 (including expenses of $331.05) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer as a self-insurer shall pay to the Claimant compensation for her temporary total disability from November 13, 1997 through February 11, 1998, based upon an average weekly wage of $198.82, which also is the weekly compensation rate, such compensation to be computed in accordance with Sections 8(b) and 6(b)(2) of the Act.

2. Interest shall be paid by the Employer on that past due compensation at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

3. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, commencing on November 13, 1997, subject to the provisions of Section 7 of the Act.

4. The Employer shall pay to Claimant additional compensation at the rate of ten (10) percent, pursuant to Section 14(e) of the Act, based upon those installments due between November 13, 1997 and the date of filing with the District Director of the Form LS-207, dated February 5, 1998.

5. The Employer shall pay to Claimant's attorney, Leonard M. Cordeiro, the sum of $6,751.05 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between January 6, 1998 and April 10, 2000.

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:jl